

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

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In re: BRIDGESTONE/FIRESTONE, INC.,	)	Master File No. IP 00-9373-C-B/S
TIRES PRODUCTS LIABILITY	)	MDL No. 1373
LITIGATION	)	(centralized before Hon. Sarah Evans
	)	Barker, Judge)
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THIS ORDER RELATES TO:	)	
	)	
TOM RICE, et al., Plaintiffs,	)	
v.	)	Individual Case No. IP 01-5539-C-B/S
BRIDGESTONE/FIRESTONE, INC., et al.,	)	
Defendants.	)	
	)	

**ORDER ON MOTION FOR REMAND AND RELATED MOTIONS**

This matter is before the Court on the following motions: (1) the plaintiffs' motion for remand to state court; (2) the plaintiffs' Objection to Magistrate Judge's Order; and (3) the defendants' motion to dismiss, or alternatively, for an extension of deadlines. For the reasons set out in the discussion below, the plaintiffs' motion for remand is DENIED; the Objection to Magistrate Judge's Order is OVERRULED; the plaintiffs are ORDERED to serve complete responses to all outstanding discovery within twenty days of this Order; the motion to dismiss is DENIED, but the request for extension of case management deadlines is GRANTED; this case shall be treated as a "first quarter 2002" case for case management purposes.

## **Discussion**

### **Motion for Remand**

On December 29, 2000, the plaintiffs filed a complaint in Mississippi state court against Magdalene Glatfelter, the driver of the car that allegedly struck plaintiff Darius Rice. That complaint alleged that Ms. Glatfelter had negligently operated her car, causing injury to Darius Rice. Very shortly after the filing of that lawsuit, Ms. Glatfelter filed bankruptcy. The bankruptcy court issued an order lifting the automatic bankruptcy stay on March 15, 2001, and that order was filed in the state court action on June 19, 2001. On July 2, 2001, the plaintiffs filed an amended complaint, naming Bridgestone/Firestone, Inc. ("Firestone"), Ford Motor Company ("Ford"), and East Ford, Inc. ("East Ford") as defendants and asserting for the first time claims against those defendants based on alleged defects in Darius Rice's Ford Explorer and Firestone tires. On August 2, 2001, Firestone filed a notice of removal, which all other defendants (including Ms. Glatfelter) joined. The asserted basis for removal was 28 U.S.C. §1334, which provides that the federal district courts "shall have original but not exclusive jurisdiction of all civil proceedings arising under [the Bankruptcy Code], or arising in or related to cases under [the Bankruptcy Code]."

With their motion for remand, the plaintiffs maintain that removal was improper because it was not accomplished within thirty days of when the case first became removable, as required by 28 U.S.C. § 1446(b). They also argue that certain actions taken by defendants Ford and East Ford in state court before removal, including the filing of answers and the issuance of a subpoena, constitute their waiver of the right to join in the notice of removal as required by section 1446. The plaintiffs further argue that even if this action was timely removed, the Court should abstain from exercising its jurisdiction and should remand the case to state court.

Before addressing these issues, however, we must first consider a question not squarely presented by the parties' briefs.<sup>1</sup> As noted above, the defendants grounded removal on 28 U.S.C. § 1334. The only possible jurisdictional "hook" in the language of that statute is that which creates federal jurisdiction over "civil proceedings . . . related to cases under [the Bankruptcy Code]."<sup>2</sup> "Related to" jurisdiction encompasses any proceeding that may affect the amount of property in the bankrupt estate. See, e.g., Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159,162 (7<sup>th</sup> Cir. 1994). The plaintiffs have shown that before this case was removed, the bankruptcy court entered an order, apparently on the stipulation of the plaintiffs, that limits the plaintiffs' collection of any

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<sup>1</sup>We must do so because the district court has an obligation to ensure that federal subject matter jurisdiction exists.

<sup>2</sup>This personal injury action did not "aris[e] under" the Bankruptcy Code, nor did it "aris[e] in" a case under the Bankruptcy Code.

judgment rendered against Ms. Glatfelter to her insurance coverage. In addition, the plaintiffs assert (and the defendants do not dispute) that Ms. Glatfelter's insurance company is providing a defense in this action. Under the circumstances presented here, it appears at first blush that at the time it was removed, this proceeding was not poised to have a possible impact on the amount of property in the bankrupt estate. Had other defendants not been added to the lawsuit, that would be true. But Mississippi, which supplies the law applicable to the substantive issues in this case, has adopted a statute that provides for limited joint and several liability among joint tortfeasors. See Miss. Code Ann. § 85-5-7. The statute also provides that defendants required to pay a greater portion of the plaintiff's damages than those commensurate with their allocation of fault have a right of contribution against their joint tortfeasors. See id. See also DePriest v. Barker, 798 So.2d 456, 458-59 (Miss. 2001). Therefore, although a judgment in favor of the plaintiffs and against Ms. Glatfelter may have no impact on her bankrupt estate, it is possible that contribution claims by the other defendants against her would. We therefore conclude that section 1334 does supply federal subject matter jurisdiction.

We next address whether removal was proper under 28 U.S.C. § 1446. The plaintiffs correctly note that the basis for federal subject matter jurisdiction arose upon Ms. Glatfelter's bankruptcy filing (or, alternatively, the lifting of the stay), thereby giving

her thirty days (or until July 18, 2002, at the very latest<sup>3</sup>) to remove the case. The plaintiffs' assertion that the mere amendment of a complaint does not create a new thirty-day removal period is also correct, as a general proposition. See, e.g., Wilson v. Intercollegiate (Big Ten) Conference, 668 F.2d 962, 965-66 (7<sup>th</sup> Cir. 1982). In Wilson, however, the Seventh Circuit<sup>4</sup> recognized an exception to this rule that is applicable here. When the plaintiff files an amended complaint that significantly alters the original complaint, that filing will revive the thirty-day period for removal. Id. Here, the plaintiffs not only sued three new defendants, but they also dramatically changed the focus and theories of the case from a simple negligence action against the other driver to a products liability action against two major manufacturers and a dealer. See also Johnson v. Heublein, Inc., 227 F.3d 236, 241-42 (5<sup>th</sup> Cir. 2000) (amended complaint that named new defendant and pleaded new facts and theories would be treated as new action with new thirty-day period for removal). Under these circumstances, the filing of the amended complaint started a new thirty-day clock under section 1446, so removal was timely.

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<sup>3</sup>We need not and do not decide whether the initial thirty-day period for removal was commenced by the filing of the bankruptcy petition, the bankruptcy court's order lifting the stay, or the filing of that order in the state court action. The removal petition was filed more than thirty days after the latest possible date on which the original complaint first became removable.

<sup>4</sup>The law of the Seventh Circuit applies to the removal and remand issues presented in this case. See Halkett v. Bridgestone/Firestone, Inc., 128 F.Supp.2d 1198, 1200 (S.D. Ind. 2001).

We need not tarry long with the plaintiffs’ assertion that the newly-named defendants waived their rights to remove (or to join in removal) by filing answers or issuing a subpoena in the state court action. As we have earlier noted, the Seventh Circuit has unequivocally rejected that argument. See Halkett v. Bridgestone/Firestone, Inc., 128 F.Supp.2d at 1201 (citing Rothner v. City of Chicago, 879 F.2d 1402, 1416 (7<sup>th</sup> Cir. 1989), in which the Seventh Circuit held that absent some “extreme situation” like fully trying the state court case on the merits, the right to remove cannot be waived). See also Hill v. Maton, 944 F.Supp. 695, 697 n.3 (N.D. Ill. 1996) (argument that the filing of a motion to dismiss in state court constituted a waiver of right to remove “is a loser in the Seventh Circuit” (citing Rothner)). No defendant waived the right to remove or to join in the removal petition.

Having determined that the case was properly removed, we now consider whether abstention is appropriate. 28 U.S.C. § 1334(c) sets out the conditions for both mandatory and discretionary abstention. The plaintiffs, following the defendants’ discussion in their response brief of mandatory abstention under section 1334(c)(2), argue for the first time in their “rebuttal” brief that mandatory abstention applies here. That argument ignores 28 U.S.C. § 157(b)(4), which provides that non-core proceedings under section 157(b)(2)(B) (including personal injury tort claims) “shall not be subject to the mandatory abstention provisions of section 1334(c)(2).” See also In re Dow Corning Corp., 86 F.3d 482, 497 (6<sup>th</sup> Cir. 1996) (non-core proceedings that involve liquidation of personal injury tort or

wrongful death case not subject to mandatory abstention provisions).

Although abstention is not mandated, we now examine whether permissive abstention under 28 U.S.C. § 1334(c)(1) is nevertheless advisable.<sup>5</sup> That subsection allows the district court to abstain from hearing a non-core proceeding “in the interest of justice, or in the interest of comity with State courts or respect for State law.” Courts have considered a host of factors in applying this subsection, including: effect (or lack thereof) on the efficient administration of the bankrupt estate, predominance of state law issues over bankruptcy issues, difficulty or unsettled nature of the applicable law, existence of related proceedings in state court, whether other bases for federal subject matter jurisdiction exist, the burden on the federal court’s docket, the extent to which the commencement of the case in federal court involved forum shopping, existence of the right to a jury trial, the presence of non-debtor parties, comity, possibility of prejudice to the other parties in the case, the economical use of judicial resources, and the expertise of the court. See, e.g., In the Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 6 F.3d 1184, 1189 (7<sup>th</sup> Cir. 1993). The Seventh Circuit has instructed that these factors are to be applied flexibly because “their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative.”

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<sup>5</sup>The plaintiffs do not actually rely on this statute in urging abstention, but rather on 28 U.S.C. § 1452, which allows remand on “any equitable ground.” Our analysis under section 1334(c)(1) of whether abstention is “in the interest of justice” implicates the equitable considerations contemplated by section 1452.

Id. Applied here, these factors do not tilt heavily in favor of either conclusion. Certain considerations militate in favor of abstention: state law issues will dominate in this case; there is no other asserted basis for federal jurisdiction; only non-debtor parties will likely take an active role in this stage of the litigation; an impact of this case on Ms. Glatfelter's bankrupt estate is not certain; and the defendants did apparently seize on the bankruptcy filing as a means to remove this action to federal court to facilitate their strategy of consolidating the hundreds of products liability cases filed against them. Other factors counsel retention of the case: pre-trial administration of the case in this MDL is more efficient; this court has developed expertise regarding the issues likely to arise; neither this court nor the district court in Mississippi is likely to be confronted with applicable law of a difficult or unsettled nature; the Court is aware of no related actions pending in state court; and the plaintiffs' right to a jury trial will not be compromised because the matter will be tried in the district court, not in the bankruptcy court.

On balance, we determine that the benefits of coordinated, consolidated pre-trial administration of this case is the more efficient use of judicial resources, that this court and the district court in Mississippi are as able to handle it as the state court, and that the plaintiffs are not prejudiced by the federal court's exercise of its proper jurisdiction over the case. We therefore will not abstain from hearing the case as permitted by 28 U.S.C. § 1334(c)(1).



For all of the above reasons, the motion for remand is DENIED.

### **Objection to Magistrate Judge's Order**

The plaintiffs filed their motion for remand while this case was pending before the District Court for the Southern District of Mississippi. The magistrate judge in that court entered an order staying all proceedings, including discovery, until the court determined the jurisdictional issues raised by the motion for remand. The case was transferred to this MDL without that court having ruled on the motion for remand.

After transfer, the defendants served discovery requests on the plaintiffs, who took the position that the discovery had been served in violation of the stay entered by the transferor court, which had never been lifted. The defendants filed a motion to compel discovery, which Magistrate Judge Shields granted in her order dated April 12, 2002. The plaintiffs then filed a motion for reconsideration of that order, which the Magistrate Judge denied on July 1, 2002. The plaintiffs' objection to the April 12 and July 1 orders was then lodged with this district judge.

With their objection, the plaintiffs assert, as they did with Magistrate Judge Shields, that the stay entered by the Southern District of Mississippi was in effect when the defendants served their discovery requests and has never been lifted. This court

agrees that the better, more direct approach would have been for the defendants, before serving discovery, to have requested a lifting of the stay. Instead, they took the more aggressive approach of filing a motion to compel.<sup>6</sup> Regardless of the motion's denomination, however, the Magistrate Judge's determination was clear: discovery would no longer be stayed. The plaintiffs' assertion that she failed to take into account the earlier stay cannot be squared with the express consideration of that fact in her written orders. She simply determined – consistent with this court's often-articulated position – that discovery should proceed while the remand motion was pending. That she ruled on the motion as presented (in the context of a motion to compel rather than a motion to lift stay) matters not. Her order gave the plaintiffs ample time to respond to the discovery requests and assigned no sanction for their earlier refusals to respond.

For these reasons, the Objection to Magistrate Judge's Order is **OVERRULED**. The plaintiffs are **ORDERED** to serve complete responses to all outstanding discovery within twenty days of this Order.

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<sup>6</sup>The defendants apparently took the position that the stay simply disappeared upon transfer because (1) this court does not have a local rule staying discovery until remand motions are decided; (2) the Comprehensive Case Management Schedule does not include exceptions to discovery deadlines for cases with pending remand motions; and (3) this court has denied requests for stays under similar circumstances. See Firestone's Brief in Support of Its Motion to Dismiss at 3-4. We do not agree that these facts, though accurate, lead to the conclusion that this court will simply *ignore* an order of the transferor court. As explained below, the Magistrate Judge properly took the stay into account and ruled that discovery should go forward.

### **Motion to Dismiss or for Extension of Deadlines**

Defendants Ford and Firestone maintain that the plaintiffs' failures to respond to their discovery requests and to comply with the Magistrate Judge's Order of April 12, 2002, compelling discovery warrant dismissal of their claims under Fed.R.Civ.P. 37(b)(2) and 41(b). Alternatively, they request that the case management deadlines be extended to account for the delays in discovery occasioned by the plaintiffs' refusal to supply discovery.

We find that the plaintiffs' conduct does not warrant dismissal. Their position that the stay issued by the Southern District of Mississippi remained effective after transfer was tenable, at least until the Magistrate Judge's order of April 12, 2002, when she made clear that the stay was no longer effective. The plaintiffs requested reconsideration of that order and then filed an objection with the district judge, as was their right.<sup>7</sup> Moreover, the plaintiffs have provided some discovery while they asserted their rights to object. The Defendants' motion to dismiss is therefore DENIED. In light of the delays, however, the Court ORDERS that this case will be treated as a "first quarter 2002" case

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<sup>7</sup>The plaintiffs' handling of the discovery dispute has been less than exemplary. They failed to respond to the motion to compel and they waited too long (twenty-one days) to file their motion to reconsider. Dismissal, however, is not an appropriate sanction for these transgressions.

for case management purposes.

It is so ORDERED this \_\_\_\_ day of August, 2002.

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SARAH EVANS BARKER, JUDGE  
United States District Court  
Southern District of Indiana

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